IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAY JOHANNIGMAN, MD,	:	
Plaintiff,	:	**CASE NO. 1:19-CV-00280**
v.	:	**JUDGE MICHAEL R. BARRETT**
UNIVERSITY OF CINCINNATI PHYSICIANS, INC. dba UC PHYSICIANS *et al.* ,	:	
Defendants.	:	

DEFENDANT UNIVERSITY OF CINCINNATI'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

In his Memorandum in Opposition, Plaintiff Jay Johannigman has failed to demonstrate that Defendant University of Cincinnati's ("UC") Motion to Dismiss should not be granted on sovereign immunity grounds. Plaintiff baselessly makes the following arguments in his Memorandum in Opposition: (1) UC does not act as an arm of the state as to him, an employee; (2) UC has consented to suit under USERRA; and (3) Congress validly abrogated sovereign immunity for purposes of USERRA, and this abrogation is valid because USERRA was passed under Congress's War Powers. However, Plaintiff's arguments have no merit, and UC's Motion to Dismiss should be granted.

First, the case law is clear that UC is an arm of the State of Ohio and, as such, is entitled to sovereign immunity. Although Plaintiff argues that UC should not be considered an arm of the State because it was acting as Plaintiff's employer, UC is still acting as an arm of the State in its role as employer. *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir. 1995). Further, Plaintiff has not cited any cases to support that UC has waived its sovereign immunity as to his state law

claims, and fails to distinguish the well-established law demonstrating UC's sovereign immunity as to state law claims.

Second, UC has not consented to suit in federal court under USERRA. Simply because medical personnel of the armed forces receive training through the Center for Sustainment of Trauma and Readiness Skills ("C-STARS") program, UC has not consented to suit for USERRA claims in federal court. In order for UC to waive its sovereign immunity, it must either voluntarily invoke the jurisdiction of the federal court or clearly declare its consent to same. *Univ. of Cincinnati v. Red Cedar Solutions Group, Inc.*, No. 1:14-cv-458, 2015 WL 736425, at *3-4) (S.D. Ohio 2015). However, providing training to medical personnel of the armed forces does not meet this test.

Finally, Congress has not abrogated the State's sovereign immunity as to USERRA claims pursuant to its War Powers. Further, the State has not waived its sovereign immunity by ratifying Congress's War Powers enshrined in Article I of the Constitution. *Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 962-965 (N.D. Ohio 2008)

Here, Defendant UC is entitled to sovereign immunity from suit under the Eleventh Amendment of the Constitution as to all of Plaintiff's claims. This immunity has not been abrogated or waived and, therefore, UC's Motion to Dismiss should be granted.

II. LAW AND ARGUMENT

A. UC is an Arm of the State of Ohio and Entitled to Sovereign Immunity

While Plaintiff clams that UC is not an arm of the State of Ohio, the case law is clear that UC is in fact an arm of the state of Ohio and entitled to Eleventh Amendment Immunity. *Al-Maqablh v. Univ. of Cincinnati College of Medicine*, 2012 WL 6675761, *2 (S.D. Ohio Dec. 21, 2012) (Beckwith, J.) (citing *Thomson v. Harmony*, 65 F.3d 1314, 1319 (6th Cir.1995)); *Dillion v.*

University Hosp., 715 F.Supp. 1384, 1386–87 (S.D. Ohio 1989). Plaintiff states that he does not dispute that the case law indicates that UC is a public entity, but believes that is not where the inquiry ends. (Mem in Opp. p. 6). However, the case law does not simply refer to UC as a public entity - *it states that it is an arm of the State of Ohio*. *Al-Maqablh v. Univ. of Cincinnati College of Medicine*, 2012 WL 6675761, *2 (S.D. Ohio Dec. 21, 2012) (Beckwith, J.) (citing *Thomson v. Harmony*, 65 F.3d 1314, 1319 (6th Cir.1995)) (emphases added); *Dillion v. University Hosp*., 715 F.Supp. 1384, 1386–87 (S.D. Ohio 1989).

Plaintiff argues that UC is not an arm of the State of Ohio because the requested relief does not implicate state funds. (Mem. in Opp. p. 4, PAGEID #151). However, in the Complaint, Plaintiff has requested both compensatory and liquidated damages. (Doc. #1, PAGEID #21). While Plaintiff is also requesting prospective injunctive relief, to now claim that he is not seeking monetary damages is inconsistent with the relief sought in his Complaint.

Further, Plaintiff's argument that UC has not acted as an arm of the State because it is so entangled with private Defendants UC Health and UC Physicians, Inc., has no merit. Plaintiff has not cited any case law indicating that UC as an arm of the State of Ohio somehow waives its sovereign immunity when acting with non-state defendants in relation to Plaintiff's employment. Further, Plaintiff has a remedy for any alleged wrongs committed by UC, in the Ohio Court of Claims. Although Plaintiff argues that dismissing these claims against UC would frustrate judicial economy by creating parallel litigation in the Court of Claims (Mem. in Opp. p. 1, PAGEID #148), judicial economy does not allow the Courts to create subject matter jurisdiction where it does not otherwise exist. UC has waived its sovereign immunity as to state law claims only as to actions filed in the Ohio Court of Claims. O.R.C. § 2743.02; *see also* O.R.C. § 2743.03(A)(2). None of Plaintiff's arguments is supported by any law and all are without merit.

Plaintiff discusses *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1985), cited by UC in support of its argument that it is entitled to sovereign immunity. (Mem. in Opp. p. 5, PAGEID #152). Plaintiff argues that the *Pennhurst* Court stated that doctrines, such as *Ex Parte Young*, have evolved to empower federal courts to vindicate federal rights, and then states that *Pennhurst* does not indicate whether Plaintiff's request for prospective injunctive relief is barred by sovereign immunity. (*Id.*). While UC does not disagree that the doctrine of *Ex Parte Young* has evolved to give federal courts the power to hear claims for prospective injunctive relief in certain circumstances in federal court, Plaintiff has failed to plead this case properly in order to assert a claim under *Ex Parte Young*.

Here, because UC is an arm of the State of Ohio and entitled to sovereign immunity, and has not waived its sovereign immunity, Plaintiff's sex and military discrimination claims (Counts 1 and 3), retaliation claim (Count 2) and defamation claim (Count 6) should be dismissed against UC as a matter of well-established law.

B. UC Has Not Consented to Federal Court's Jurisdiction for USERRA claims

Plaintiff erroneously argues that UC has consented to suit in federal court under USERRA because medical personnel of the armed forces receive training through the C-STARS program. In support of his argument that UC can consent to a federal court's jurisdiction by a voluntary act indicating waiver, Plaintiff cites to *Univ. of Cincinnati v. Red Cedar Solutions Group, Inc.*, No. 1:14-cv-458, 2015 WL 736425, at *3-4 (S.D. Ohio 2015) (Litkovitz, M.J.) However, this case is inapplicable here, and once again, Plaintiff's efforts to overcome UC's Motion to Dismiss fail as a matter of law.

In *Univ of Cincinnati*, *supra*, UC sued Defendant Red Cedar Solutions Group bringing various state law claims against it. When Red Cedar Solutions Group answered and raised

counterclaims against UC, UC argued that it had sovereign immunity as to state law claims brought against it in federal court. The Court stated that the test to determine whether the state has waived its sovereign immunity is a stringent one and that Courts generally find waiver when the State voluntarily invokes the jurisdiction of a federal court, or where the State clearly declares its consent to same. (*Id.* at *9). In that case, the Court determined that UC had waived its sovereign immunity by bringing the action in federal court. Obviously, this case is different - UC did not initiate this action and invoke the jurisdiction of this Court. Here, applying this test, UC has not consented to this Court's jurisdiction through its C-STARS program. By running the C-STARS program, UC has neither voluntarily invoked the jurisdiction of a federal court nor clearly declared its consent to same. Therefore, Plaintiff's argument otherwise is of no avail.

C. Congress Has Not Abrogated UC's Sovereign Immunity as to USERRA claims

Finally, Congress has not abrogated UC's sovereign immunity as to USERRA claims in federal court. In *Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953 (N.D. Ohio 2008), the Court held that the State of Ohio is entitled to sovereign immunity under the Eleventh Amendment as to claims brought pursuant to USERRA in federal court. The *Risner* Court went on to further state that Congress did not validly abrogate the State's sovereign immunity as to claims brought pursuant to USERRA. *Risner* at 964-965.

Plaintiff states that USERRA's statutory language in § 4323(b)(2) abrogated the state's sovereign immunity by stating that an action "may" be brought by a person against the State in a state court of competent jurisdiction. (Mem. in Opp. p. 8, PAGEID #155). However, the Court in *Risner* analyzed the legislative history of USERRA and the 1998 amendments and ultimately agreed with other district courts in determining that Congress did not abrogate the State's sovereign immunity as to USERRA claims in federal court. *Risner* at 960-961. *Citing Hostetler*

v. United States, No. 2:05-cv-433, 2005 U.S. Dist. LEXIS 26071, *7 (S.D. Ohio 2005) (Sargus, J.) (district courts only have jurisdiction over USERRA claims against the state in actions brought by the U.S.); *Velasquez v. Frapwell*, 165 F.3d 593, 594 (7th Cir. 1999) (holding that the Court lacked jurisdiction over a USERRA claim against a state employer in federal court because the amendments conferred jurisdiction only to state courts); *Larkins v. Dep't of Mental Health*, No. 97-W-1536-N, 1999 U.S. Dist. LEXIS 9137, *3-5 (M.D. Ala. 1999) (federal court did not have jurisdiction over USERRA claims against a state employer in federal court because jurisdiction was exclusively in the state court after the 1998 amendments); *Valadez v. Regents of the Univ. of Cal.*, No. S-03-0433, 2005 U.S Dist. LEXIS 21693, *12-15 (E.D. Cal. 2005) (federal district courts lack jurisdiction over USERRA claims brought against the state).

Plaintiff further argues that Congress validly abrogated the State's sovereign immunity as to USERRA claims pursuant to Article I War Powers. (Mem. in Opp. p. 7-8, PAGEID #154-155). However, again, the *Risner* Court disagreed and adopted the reasoning of several other cases in holding that Congress did not have authority under the War Powers to validly abrogate the State's sovereign immunity as to USERRA claims against the State in federal court. *Citing Rotman v Bd. of Trustees of Michigan State Univ.*, No. 1:96-cv-988, 1997 U.S. Dist. LEXIS 10754 (W.D. Mich. 1997); *Palmatier v. Michigan Dep't of State Police*, 981 F. Supp. 529 (W.D. Mich. 1997); see also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59-60 (1996) (Congress cannot generally abrogate state sovereign immunity using powers authorized prior to the enactment of the Fourteenth Amended, including war powers).

Plaintiff then argues that the State waived sovereign immunity by ratifying Congress's War Powers enshrined in Article I of the Constitution. (Mem. in Opp. p. 9, PAGEID #156). The *Risner* Court specifically rejected this argument. In *Risner*, the Court held that "[t]o the extent

Plaintiff contends that Congress can override sovereign immunity in the exercise of its war powers, this supposition is clearly prohibited…" *Citing Alden v. Maine*, 527 U.S. 706 (1999) (Congress cannot override sovereign immunity to achieve objectives within the scope of its enumerated powers).

In order for UC to not have sovereign immunity of Plaintiff's USERRA claims, Congress either had to validly abrogate the State's sovereign immunity or the State had to waive it in order for Plaintiff's USERRA claims to proceed in this Court. *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985). However, as stated *supra*, Congress has not validly abrogated the State's sovereign immunity and the State of Ohio has not waived that immunity either. *Risner* at 963. Therefore, Defendant UC is entitled to sovereign immunity as to Plaintiff's two USERRA claims and those claims should be dismissed accordingly.

III. CONCLUSION

For reasons discussed above, and in Defendant's Motion to Dismiss, Defendant UC respectfully requests that the Court dismiss Plaintiff's First Amended Complaint against it in its entirety because Plaintiff's claims are barred by sovereign immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that the foregoing *Defendant University of Cincinnati's Reply in Support of Its Motion to Dismiss* was filed electronically on July 25, 2019. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Wendy K. Clary

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